No. 15515

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH,
as Trustee, *Appellant,*

vs.

R. MAX ETTER and
PAUL C. KEETON, *Appellees.*

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEES

F. J. McKEVITT

711 Old National Bank Bldg.,
Spokane 1, Washington,

Attorney for Appellees.

SHAW & BORDEN CO. 320212

INDEX

TABLE OF CASES

RULES OF COURT

No. 15515

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

RALPH B. DEFENBACH,
as Trustee, *Appellant,*

vs.

R. MAX ETTER and
PAUL C. KEETON, *Appellees.*

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEES

JURISDICTION

Appellees accept the jurisdictional statement of the appellant.

STATEMENT OF THE CASE

The appellees accept appellant's statement of the case, background facts, pleadings and proceedings.

ARGUMENT

In order to properly discuss appellant's assignments of errors it is deemed advisable to set out in their entirety the District Court's Findings of Fact and Conclusions of Law:

"PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled Court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties in said causes and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I

That defendant by stipulation made in open Court conceded the power of the Court to fore-

close said lien, and in his answer admitted his willingness and desire to have the Court determine the issues involved in the petition of petitioners. (R 25)

II

That without any specific contract as to attorneys' fees, petitioners for and on behalf of said defendant and at (23) his instance and request rendered legal services in causes Nos. 1308 and 1309 in the above entitled Court, in which causes the defendant, Ralph B. Defenbach, as Trustee, was successful.

III

That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.

IV

That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of $15,000.00.

From the foregoing Finds of Fact the Court makes the following:

Conclusions of Law

I

That petitioners are entitled to recover for their services the sum of $15,000.00. (R. 26)

Done in open Court this 8th day of February, 1957.

(s) SAM M. DRIVER,
Judge.

Presented by Attorney:
(s) F. J. McKEVITT (R. 27)

Preliminary to such discussion the attention of this Honorable Court is invited to Rule 52 (a) of the Rules of Civil Procedure. That rule, among other things, prescribes that the Findings of Fact in actions tried without a jury

> "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

ANSWER TO SPECIFICATION OF ERROR NO. 1

That specification calls into question Finding of Fact No. III of the District Court reading as follows:

> "That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully." (R. 26)

The attention of the Court is directed to appellant's Statement of Points, reading as follows:

"Statement of Points

To the above entitled Court and to Stanley D. Taylor, Clerk thereof, and to R. Max Etter and Paul C. Keeton and Francis J. McKevitt, your attorney:

You are hereby notified that the following is a statement of points upon which the appellant, Ralph B. Defenbach, as trustee, will rely on his appeal to the Court of Appeals for the Ninth Circuit:

1. Fifteen thousand dollars ($15,000.00) is excessive compensation for the services of petitioning attorneys in these proceedings.

2. The trial court erred in finding that $15,000.00 was reasonable compensation for such services.

3. The trial court erred in entering judgment for $15,000.00 as compensation for such services.

Dated this 9th day of April, 1957.

(s) Thomas Malott,
Attorney for Defendant. (163)"
(R. 145)

It will be observed that appellant's Specification of Error No. 3 is not included within the statement of points. Appellees urge that such failure is a violation of Rule 19, Sub-paragraph 6 of the Rules of this Court, the applicable portions of which are as follows:

"In all cases * * * the appellant, * * * upon the filing of the record in this court, shall file with

the clerk a concise statement of the points on which he intends to rely. With such statement the appellant * * * shall file a designation of all the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the designation. * * * If parts of the record shall be so designated by one or both parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the *points so stated.*" (Emphasis supplied)

In this connection see also:

Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue, 126 F. 2d p. 48 (Ninth Circuit);

Western National Insurance Co. v. LeClare, 163 F. 2d 337 (Ninth Circuit);

United States v. Gallagher, 151 F. 2d 556 (Ninth Circuit).

In any event there is ample evidence in the record justifying such a finding.

The attention of the Court is directed to the testimony of appellee, Paul C. Keeton, which the District Court accepted as correct:

"Q. Now, do you recall then when, if there was, the first meeting in which Mr. Defenbach and yourself and Mr. Etter were present in connection with this litigation?

A. No, I'm not sure of the first time. I can tell you one of the times, which would have been the 17th day of October of 1955.

Q. Well, prior to that time, had there been any discussion (48) between Mr. Defenbach and yourself concerning attorney fees?

A. Yes, I discussed it with Mr. Defenbach. (R. 45)

Q. And what was the result of that discussion? What did you say to him and the substance and what did he say to you?

A. Well, Mr. Defenbach told me on many occasions that his position was a very vague one; that he didn't know what he could do with the approximately $8,000 that he had on hand. There were 40,000, or in that neighborhood, of tax liens.

Q. State and Federal?

A. State and—

MR. MALOTT: Pardon me, are you narrating conversation or giving background? I don't care, but I wish you would distinguish.

A. I am narrating conversation.

MR. MALOTT: Okay.

A. Mr. Defenbach and I discussed the tax liens which were on this money, aggregating, I think, 36,000 plus, for sure—in fact, I have them all here, the tax liens; that also Mr. Weyen had been accused by the Federal Gov-

ernment of a timber trespass and both Mr. Defenbach and I had been warned by the United States Attorney that they claimed a priority on any moneys in this creditors' pool first, and also the United States Attorney advised Mr. Defenbach by letter that he would hold Mr. Defenbach personally liable if he paid out any creditors or anybody ahead of the U. S. Government on both the tax liens and the timber trespass, and I have his letter right here, if you would like to see it.

Q. (By Mr. McKevitt): Well, at any time then and because of his feeling in that regard, did he advance you any moneys of any kind or character by way of expense or anything else? (R. 46)

A. He did not.

THE COURT: I don't think it makes any difference, probably, but is that the United States Attorney for the District of Idaho?

A. Yes, sir.

THE COURT: Yes, all right.

Q. (By Mr. McKevitt): Do you have a copy of that letter?

THE COURT: I don't care to see the letter, I just was curious to know whether it was this office or the Idaho office. It doesn't make any difference.

MR. McKEVITT: It is a very peremptory demand—I don't mean peremptory, but I mean very indicative of their position.

THE WITNESS: I might state one more thing, Mr. McKevitt.

Q. Go ahead.

A. Regarding the holding of the moneys in the fund, immediately after Mr. Weyen's death, the Bureau of Internal Revenue notified Mr. Defenbach that they were going to go back several years and audit Mr. Weyen's tax returns for income tax assessments or violation and that he would have to impound all of his records and hold all of his records together undisturbed, so to speak. So Mr. Defenbach rented an office in the same building that my office is in, these records were impounded in that building, and on account of the letter which Mr. Defenbach is looking at now, no moneys were (R. 47) paid out on that office for rent, which was accruing at the rate of $25 per month, for eleven and one-fifth months.

Q. And while we are on that subject, is it not the fact that the payment was finally made after the entry of judgment in this court; is that true?

A. The payment of the rent was made three and a half months after the entry of the judgment in this Court on March 14, 1956. There is the receipt for the rent (indicating).

Q. Well, now, can that chronologically bring us down to a meeting then had between yourself and Mr. Etter and Mr. Defenbach?

A. Yes.

Q. All right, tell the Court about that.

A. Well, I had had discussions, as I said, with Mr. Defenbach about what to do with the 8,000 some odd dollars there were on hand on numerous occasions. He told me that untl his position was clarified, he wasn't going to do anything with it or pay it out at all, because the government might consider him what they call a transferee and also—

MR. MALOTT: Pardon me, Mr. Keeton, are you now narrating, telling of the conversation in Mr. Etter's office?

A. No, I am not.

MR. MALOTT: I think that was the question.

A. It is not responsive, I will answer it.

MR. MALOTT: I don't want to be technical, but I am trying to distinguish between conversations and background. (R. 48)

MR. McKEVITT: I see.

MR. MALOTT: That is what I am trying to do.

THE COURT: That was just introductory, probably. Your question called for conversation in Mr. Etter's office.

MR. McKEVITT: Well, I don't know whether it was in Mr. Etter's office, but where the three of them were present. I think the three were in Spokane.

A. All right, there were three—

MR. MALOTT: Pardon me, if you will just try to distinguish. I have no objection to giving background if you try to distinguish between background and direct conversation.

A. I will tell the time and place of each conversation.

MR. MALOTT: Yes.

A. The day before the trial on October 17th of 1955, Mr. Defenbach had come from Lewiston and so had I and we were over in the Ridpath Hotel. At that time I told Mr. Defenbach that I had prepared a letter that I was going to give him concerning a fee arrangement in this case, as we had had none so far. He told me that it would be no use because he felt that he had no authority whatsoever to make any fee in the case; there would be no use to talk with him about any agreement or any fees in the case.

And I went over to Mr. Etter's office and told that to Mr. Etter, and he came back with me to the hotel. (R. 49)

Q. (By Mr. McKevitt): Well, maybe we haven't established when Mr. Etter definitely came into the litigation after the interpleader action was filed.

A. Mr. Etter came into the litigation on 7-25-55.

* * * *

Q. (By Mr. McKevitt): Now, with reference to any meeting that was had between you and Mr. Etter and Mr. Defenbach and pertaining to this litigation, when did you say that took place and where?

A. Well, it took place the night before the trial on the 17th in the Ridpath Hotel.

Q. Three of you present?

A. Three of us present.

Q. Was there a fee discussion, a discussion about fees?

A. Yes, I had been to Mr. Etter's office and told him that—

MR. MALOTT: Pardon me, I wish you would try to stick to the discussion.

A. Yes, there was a discussion about fees at that time.

Q. (By Mr. McKevitt): The three of you there?

A. Yes.

Q. What was that discussion? What was said? (R. 50)

A. Well, Mr. Defenbach said that on account of the tax liens on various restraints that were put on that, that he would not be able to pay any fees at that time.

Q. And was he concerned at all about any information he had received from the Federal Government about possible personal liability on his part?

A. Yes, he was.

Q. Is that referred to in this letter of November 16, 1955, to Mr. Defenbach from the United States Attorney in Boise?

A. That's right.

Q. Well, now, in this conversation in this meeting here in Spokane, did Mr. Etter make any observation to Mr. Defenbach about fees?

A. Well, Mr. Etter wanted a retainer fee on the case. He asked Mr. Defenbach for a retainer fee on the case, and Mr. Defenbach explained, as I have said, that he would not pay any of this money out on account of the fact of all these prior claims, and also that under the Defenbach Trustment agreement of November 15th—

Q. 1954.

A. —1954, in that agreement the government has a priority to any moneys that come into the pool. So Mr. Etter at that time said: 'Well, under those circumstances, we take these cases on a contingent fee or handle them on a contingent fee.'

Q. Did Mr. Etter make any observation as to the amount of the contingent fee?

A. He talked about percentages, yes. He talked about 25 per cent if settled, 30 per cent if tried, (R. 51) and 40 per cent if appealed, and Mr. Defenbach said that he could not agree to anything.

Q. Well, did he say anything with reference to the reasonableness or unreasonableness of such

an arrangement if he had been able to enter into it?

A. He said—

MR. MALOTT: Objected to, if the Court please, if it is for the purpose of proving a contract.

THE COURT: No—

MR. McKEVITT: No, it isn't for the purpose of proving a contract.

MR. MALOTT: The witness is not an expert on the thing and his opinion would not—

THE COURT: Well, it might be an admission against interest. I will let him answer.

MR. McKEVITT: My position was, accepting this to be true, that it showed that he considered at that time the fee to be reasonable. That is my purpose, your Honor.

THE COURT: I see.

A. He said that he had no objection to that type of arrangement, but, however, he would not agree to it.

Q. Is that where the matter then was left standing so far as fees were concerned?

A. That was where the matter was left standing." (R. 52)

Appellee Etter in this connection testified as follows:

"Q. Now, Mr. Etter, I want to ask you this one question particularly with reference to this conversation that Mr. Keeton spoke about in Spokane where the three of you were present and the fee discussion was had. Will you tell the Court what took place in your recollection?

A. As close as I can remember—I talked with Mr. Malott at the recess—there is probably some question as to whether the conversation took place in the Ridpath or in my office or partly in both, and, as I recall, we discussed the case both places, over in my office and later when we went over to the Ridpath Hotel. The three of us were together at every time, so I would say that the discussion was either in the office or in the hotel or half in one and half in the other, as I recollect it.

I had talked, I think, with Mr. Defenbach at one time before. I just think that, although I may be in error. It might be that I corresponded with him through Mr. Keeton, I'm not sure of that, but the definite one that I remember is the day prior to trial when we had a discussion about fees.

Q. The contents of that was what?

A. Beg your pardon?

Q. Give us that discussion.

A. Mr. Keeton came over and told me—I had asked Mr. Keeton to get some arrangement with Mr. Defenbach and I told him that I should like to have it on at least a partly retainer basis. Mr. Keeton came over and told me he had talked with Mr. Defenbach about

it and hadn't reached any agreement and would I talk to Mr. Defenbach, or they both came over together, but in any event I had made a proposal on fees before and I repeated it generally to Mr. Defenbach. I had suggested if (R. 71) he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of $2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent.

And he said that he was unable to pay any retainer at all, and during the course of the conversation we discussed the matter of retainers, and I said it was a practice, at least in Spokane as I understood it, to provide for a retainer in possibly three different grades; one of 25 per cent, one of 30 and one of 40. I explained to him our practice here on contingent fees; that if there were advance payments made for costs and probably was settled without litigation, it would be 25 per cent, unless there was some provisions made for some type of a retainer.

Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all of the rest of it, which I knew to be in a considerable amount, assuming we had to go to the Appellate Court in San Francisco.

I didn't care for that arrangement, I'll be frank to say, and I said so, but I told him that as long as we were in the case, we would

try it out on that basis. When I explained to him what these matters (R. 72) of contingency were, he said as far as the proposals were concerned, they were reasonable, but that he could not agree to them and that was that.

That was just about the situation. There was no objection. He didn't say, as Mr. Keeton said, exactly that he had no objection; he said as far as he was concerned, that appeared to be a reasonable basis, but he was unable to agree to pay anything, that he would just have to take it and catch as catch can, as a matter of fact, and if we lost in the lower court and we wanted to go to the Appellate Court, that was up to us.

Q. You are speaking now about these percentage proposals?

A. That is correct, that is correct.

Q. Do I understand it is your testimony that he said he could see nothing objectionable to them?

A. That is substantially it.

Q. He considered it a reasonable fee under ordinary circumstances?

A. I shouldn't say I assumed it, but he had no objection and, in fact, we had a very pleasant conversation. He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it. that was it.

Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket? (R. 73)

A. Absolutely. * * *'' (R. 74)

This Court will keep in mind that the testimony of appellees above set forth dealt with meetings and conversations with appellant prior to the trial of the interpleader action out of which the claim of appellees for attorneys' fees arose.

That appellant would not agree to an attorneys' fee of any kind or character until after there had been a successful determination of the interpleader actions in which, in his capacity as a Trustee, he was named as a defendant, is borne out by the following testimony:

''Q. Did you have any discussion at all with Mr. Etter at any time or any place prior to the lawsuit about fees?

A. No, sir.

Q. And you never recevied any letter of any kind or character from Mr. Etter prior to the lawsuit about fees?

A. No.

Q. Nothing said about a retainer?

A. No, sir. (R. 117)

* * *

Q. Now, it is a fact it wasn't until after you knew of the existence of that check made jointly payable to you and your attorneys that you first took any interest so far as attorneys fees or expenses of this litigation were concerned; that is correct, isn't it?

A. Well, word it differently.

Q. Pardon me?

A. Word it differently. Word it that I didn't make any expenditures.

Q. In other words, is it your position that you wouldn't discuss attorney fees or expenses of this litigation of any kind or character until this lawsuit in this Federal Court here was determined; is that your testimony?

A. My testimony would be that it was agreed between Mr. Keeton and myself that we would wait until the final settlment of this, which he told me would be in the District Court in Nez Perce County, (R. 118) and he was going to petition for a declaratory judgment in Nez Perce County and at that point—

Q. Mr. Keeton told you he was going to petition Nez Perce Idaho County Court for a declaratory judgment?

A. Yes, sir." (R. 119)

Mr. Keeton categorically denied that he ever had a conversation with appellant regarding a declaratory judgment action in Idaho after the entry of judgment in appellant's favor in the interpleader action. (R. 126-127)

Again appellant urges upon this Court that the District Court erred in making Finding of Fact No. 3 by virtue of a letter written by appellee Etter on March 26, 1956. (Ex. E; R. 135-138) This Court will keep in mind that this letter was written subsequent to the entry of judgment in appellant's favor in the interpleader action on December 30, 1955.

On page 20 of his brief and in connection with this letter appellant makes the following observation:

> "A careful reading of Mr. Etter's letters (Ex. E; R. 135-144) completely negatives the proposition that counsel ever intended to be precluded from claiming a fee in the event the cases were lost."

Examination of the exhibit above referred to does not bear out appellant's interpretation of the same.

The following portion of the letter of March 26, 1956, (R. 138) gives ample support to Finding of Fact No. 3:

> "Now it seems that this whole matter of payment to the attorneys must remain in some kind

of a 'limbo' the end result of which none can foresee, but with the apparent feeling that the attorneys will continue all of the litigation *with no understanding at all as to any compensation from any source.*" (Italics supplied)

Answer to Specifications of Error Nos. I, II and IV.

The above specifications of error were the only specifications that were included in appellant's Statement of Points. They may be discussed together since they involve the single question as to whether under all of the facts in the case the allowance of a $15,000 fee was a proper one.

In opening his discussion of these specifications appellant states:

> "It is to be noted that the court does not fix the fee at $15,000 on the basis of a contract but rather on the basis of a quantum meruit, but that it apparently justifies the allowance on the theory that appellees had precluded themselves from a fee unless a recovery was had." (Br. 21)

In this connection the Court's attention is invited to the following portion of the record:

> "THE COURT: Well, I just wanted to ask this question: Is the issue here merely the amount of the attorney fees, or do you question the plaintiffs' right to collect any attorney fee?

MR. MALOTT: No question. No, we submit that an (R. 32) attorney fee should be fixed and we are just as anxious—

THE COURT: Do you both agree on the basis of what is a reasonable fee for the services rendered?

MR. MALOTT: I think not. I think there is quite a sharp conflict as to the basis, as to whether it is a contractual fee or whether it is quantum meruit.

THE COURT: Is it a claimed contractual fee?

MR. McKEVITT: We have alleged, as we are permitted to do, as your Honor well knows, in the petition that the amount which they are seeking to recover, Mr. Keeton and Mr. Etter, some $16,500, I believe, was the agreed and reasonable value of the service. However, I will say at the outset now that we are not in a position to establish a definite contract between these attorneys and Mr. Defenbach as to any fee, contingent or otherwise, and we are here on the basis that this amount of $16,500 is a reasonable fee, under all the circumstances, to be allowed." (R. 33)

Again, at page 78 of the Record: (Cross examination of Appellee Etter)

"Q. I believe you stated on your direct examination that was always your understanding, you would not be paid anything unless you won the case?

A. That's right.

Q. But I draw your attention to your letter of June 1st to Mr. Defenbach, just asking you to refresh your recollection; copy of your letter of April 13, 1956, I am drawing your attention to that, copy of which was sent to Mr. Defenbach and in part in which again you are writing on the subject of getting this fee matter straightened out, in which you say in part:

'It was my understanding that, in any event we were to be paid a flat fee for this litigation; that is, the first Sun Life cases and the Macabees case.'

A. Yes. (R. 78)

Q. Doesn't that bring anything to mind on the thing?

A. It brings to mind a flat fee basis on his arrangement, that what we were doing was a reasonable fee. There was no guarantee of any money at all. I think you can read later there that I think the flat guarantee to which we should be entitled in the fees should be $3750. He hadn't guaranteed us anything, that is why I wrote the letter.

Q. I ask you, in saying this, you say in part: 'It was my understanding that, in any event, we were to get a flat fee.'

A. By way of a contingent basis, exactly. We were never guaranteed one penny.

Q. By flat fee, you didn't mean contingent fee?

A. I was referring there to his arrangement. He thought it was agreeable, he never agreed to pay anything.

Q. All right.

A. Later on, counsel who he employed took that same position with me, that he had never agreed to pay us a cent.

Q. (Reading): 'I think that the flat guarantee to which we should be entitled for these cases and on the appeal should be $3750, plus costs and expenses.'

A. That's right, that is what I said. That is what I said. Doesn't say there that he agreed to pay it.

Q. Oh, no.

A. No. (R. 79)

Q. But you say it is your understanding that you would get a flat fee in any event.

MR. KEETON: Win, lose, or draw.

A. No, there was no understanding of that kind. If you construe it that way, you may do so, but there wasn't.

Q. I am just asking what you meant?

A. No, there wasn't—

MR. McKEVITT: May I inquire, if your Honor please, if this line of examination is being conducted for the purpose of showing that there had been a contract arrangement between these men and Defenbach?

MR. MALOTT: Apparently, yes, I think that may well be. I am trying to find out what the agreement is. This is cross examination.

THE COURT: Is it your position that there was a contract for a flat fee?

MR. MALOTT: No, your Honor, just taking the position that there was always an agreement, understanding made with Mr. Keeton that there would be a fee paid at the conclusion of the case; wait until they saw what had happened and then fix it accordingly.

MR. McKEVITT: I want to be clear if he is relying on these letters as constituting a contract. I am not clear on it, but if he is, I would object on the ground he hasn't pleaded it in his answer.

THE COURT: I don't think he is relying on a contract.

MR. MALOTT: Thus far, Mr. McKevitt I was just cross examining, I haven't put on my own case.

THE WITNESS: You see, Mr. Malott, I never received any answer to any of these letters to Mr. Defenbach. He never answered me at all.

MR. MALOTT: I realize that." (R. 81)

Four witnesses testified as to the value of the services rendered by appellees: Appellee Keeton, 25% of the recovery (R. 56); Etter, 25% (R. 77); Idaho Attorney Marcus J. Ware, 33 1/3% (R. 94); and Spokane Attorney Del Cary Smith, not less than 25% (R. 101).

Attorney Marcus J. Ware had thirty years experience covering practice in the state and Federal courts

in Idaho and the state courts in Washington. The testimony of both disinterested witnesses was based upon a lengthy hypothetical question. (R. 83-94). In answer to the hypothetical question, the witness Ware, among other things, testifed as follows:

> "Q. In arriving at that opinion, I will inquire if you had occasion to make a study of your own bar schedules, the bar schedule of Asotin County and the bar schedule of Spokane County?
>
> A. Yes, I am familiar with the bar schedules." (R. 94)

The experience of witness Del Cary Smith extended over a period of thirty years. He had practiced in the state and Federal courts of Washington and Idaho and is admitted to practice in the Federal Courts of Washington, Idaho, California and this Court. At one time he was a member of the Prosecutor's staff of Spokane County. He is a past President of the Spokane County Bar, the State Bar of Washington and a past Member of the Board of Governors of the State Bar of Washington.

As seen from the hypothetical question, in addition to the judgment sum of $66,134.94 in the interpleader cases (R. 93), and through the efforts of appellee Keeton, the Defenbach Trustee Fund was further enriched by the sum of $7500 collected by said appellee from the Mutual Benefit Association of Omaha (R. 41-42-87)

Realizing the probative value of the testimony of these two disinterested lawyers, appellant seeks to completely destroy the same in this fashion:

> "The testimony of Mr. Ware and Mr. Smith is of no value in determining the question of a reasonable fee for the reason that the hypothetical question propounded assumed 'That it was fully understood by the defendant, Ralph B. Defenbach, that the compensation, if any, for his attorneys, Paul C. Keeton and R. Max Etter, and compensation for himself as Trustee under the Assignment of November 16, 1954, would be completely dependent upon the outcome of the action above referred to, viz: that there would have to be a judgment of the above entitled Court, final after a possible appeal in favor of the defendant, Ralph B. Defenbach as Trustee.' With the collapse of that hypothesis their testimony is of no assistance to the court."

In other portions of the record lifted out of context appellant seeks to destroy the testimony of appellees to the effect that any compensation for their services would be completely dependent upon the successful outcome of the interpleader actions.

The logical conclusion to be drawn from the whole record, and particularly the testimony of Mr. Defenbach, is that he attempted as far as possible to hold petitioners at bay insofar as fees were concerned, with the idea in mind that if the interpleader action went against him that appellees, Keeton and Etter, if this Court will pardon the expression, would be left "hold-

ing the bag", while if it were successful and he could hold their fees down to an amount less than what they were demanding, the benefits thereof would quite possibly redound in part to himself and to others who had exerted no effort in enriching the Trustee fund.

Because of the inability of appellees to get any commitment from appellant as to attorneys' fees appellees withdrew from the prosecution of the appeal taken to this Court by the other defendants in the interpleader actions. Appellant, however, was quite agreeable to paying substituted counsel a $2500 fee plus $500 expenses for the prosecution of his appeal. (R. 124-126, inc.) This in the face of the admitted fact that the real labor, so far as the legal questions involved were concerned, had already been performed by appellees and made the task of the substituted counsel a comparatively simple one. On this point and on re-cross examination the appellant testified as follows:

"Q. (By Mr. McKevitt): How much did you pay that firm altogether now? Was it $3,000?

A. $3,000.

Q. And can you break that down, attorney's fees and expense?

A. $2,500 fees and $500 expenses.

Q. And—

A. They told me that they didn't think the expenses would run $500 and I would be getting a refund one of these days.

Q. And he told you the reason he didn't want to appear in your behalf in this case is because he had used certain files that Mr. Etter had in his office? (R. 125)

A. No, he didn't say that.

Q. Well, you know that what he had used was the material that Etter had collected and Keeton in this Court so far as the legal cases were involved; you knew that, didn't you?

A. Yes, I knew that." (R. 126)

In determining, what appellant overlooks, the fee that should be allowed appellees, District Judge Driver was in the advantageous position of having been the trial Court in the interpleader actions; thus he was not a stranger to the nature, kind and character of the services rendered by appellees.

Appellees feel that where the responsibility is cast upon a trial Court to establish the reasonable value of an attorney's services it is incumbent upon counsel for the respective parties to assist as much as possible the Court in reaching a proper determination. It was for this reason that reputable and experienced attorneys were called as experts in behalf of appellees. Since the reasonableness of the fee demanded by them was the sole question before the District

Court, the appellees feel it was the plain duty of appellant to produce testimony from lawyers of equal standing to counter the contention of the appellees and their witnesses. Perhaps in the reply brief some reason will be assigned for failure on the part of appellant to discharge this plain duty.

In order to assist, as far as possible, the District Court in arriving at the proper determination of the issue involved, the following proceedings took place:

> "MR. McKEVITT: I think what I would like to do at this time on this matter of fees, I would just like to leave with your Honor this Journal of the American Judicature of October and December, 1956, New York contingent fee schedule. It may be helpful and—
>
> THE COURT: Have you seen this thing?
>
> MR. MALOTT: No.
>
> THE COURT: I have heard about it.
>
> MR. McKEVITT: I will leave it with your Honor." (R. 129)

The issue above referred to contained an article with reference to the adoption of the schedule of contingent fees by Judicial Districts in the State of New York, which fee schedule was adopted as the result of an intensive study made under the direction of the Courts. That schedule follows:

50% of the first $1000
40% of the next $2000
35% of the next $22,000
20% of the next $25,000
15% of any sum over $50,000.

This schedule was comprehensive of all types of personal injury cases, simple of investigation, simple in facts, cases of involved facts and involved conclusions of law, etc. While the action out of which the instant proceedings arose was not a personal injury one, it is felt that this is a distinction without a difference. The New York Courts must have had in mind in adopting this schedule the physical disabilities under which the claimants would have to labor. On the basis of such a schedule petitioners in this case would be entitled to $16,420.00.

AUTHORITIES

The attention of this Honorable Court has already been directed to Rule 52 (a) of Federal Rules of Civil Procedure.

The appellees contend that the findings of the trial Court are supported by ample evidence and are not subject to review in this Court. See

District of Columbia v. Pace, 320 US 698, 88 L. ed 408, 64 S. Ct. 406;

Adamson v. Gilliland, 242 US 350, 353, 61 L. ed 356, 357, 37 S. Ct. 169;

Morewood v. Enequist, 23 How (US) 491, 16 L. ed 516;

Zeckendorf v. Johnson, 123 US 617, 31 L. ed 277, 8 S. Ct. 261;

Lawson v. United States Min. Co. 207 US 1, 52 L. ed 65, 28 S. Ct. 15;

Cook v. Robinson, 194 F. 753; (CAA 9th);

Cranor v. Gonzales, 226 F. 83, at 94. (CCA 9th).

In the *Cook* case, *supra,* an action tried to the District Court of the United States for the Fourth Division of the Territory of Alaska, this Court on appeal had this to say:

"The third contention relates to the findings of the court. The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it

be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is *any evidence* (italics supplied) upon which such findings could be made. (Citing cases.) It is not contended that the conclusions of law should have been different upon the facts found, but that the facts found are not supported by the evidence."

In the *Cranor case, supra,* a habeas corpus proceedings, this Court remarked:

"Since for the reasons indicated the district court here properly entertained and heard the application of Gonzales for a writ of habeas corpus, Rule 52 (a), Fed. Rules Civ. Proc. 28 U.S.C.A. prohibits us from disturbing the findings made by that court unless they are clearly erroneous; that they are not so erroneous must be manifest when it is borne in mind that the trial judge heard and observed the witnesses and noted their demeanor and manner of testifying, and had full opportunity to judge of the probability of their respective stories and to arrive at a conclusion as to the credibility of those who testified before him." (At page 94)

Appellant totally failed to produce any testimony as to what the services of appellees were worth. He has failed to advise this Court as to what extent, if any, the judgment should be modified; he has failed to indciate by what amount, if any, the fee allowance was either excessive or unconscionable. He has submitted not one single authority in support of his position. He has compelled the appellees to file liens

against the judgment procured in his favor. He has compelled them to employ counsel to represent them in the District Court and on this appeal.

We sincerely urge that this appeal is totally without merit and that by such course of conduct appellant has brought himself within the purview of subdivision 2 of Rule 26 of the Rules of this Court reading as follows:

> "In actions at law where an appeal shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of judgment."

It is respectfully submitted that this appeal be dismissed, that the judgment of the lower Court be affirmed, and that the provisions of Rule 26 be invoked against appellant.

Respectfully submitted,

F. J. McKevitt,
Attorney for Appellees

711 Old National Bank Bldg.,
Spokane 1, Washington.